

**REMARKS**

Applicants respectfully request reconsideration of the present application in view of the foregoing amendments and in view of the reasons that follow.

**Status of the claims**

Claims 24 and 26-51 were pending in the subject application, of which claims 49 and 50 had been withdrawn from consideration by the Examiner. With this submission, claim 35 has been amended, yet no claims have been canceled or newly added. Hence, upon entry of this paper, claims 24 and 26-51 will remain pending in the subject application, and all but claims 49 and 50 under active consideration.

**35 U.S.C. § 112, second paragraph, rejections**

Claim 35 stands rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for reciting the presence of a plasticizer, but at “0%.” The same claim have now been amended to recite a range of 3-10%, support for which may be found in the sentence bridging pages 2 and 3 of the application. Withdrawal of the rejection is respectfully solicited.

**35 U.S.C. § 102 rejections**

Claims 24, 26-35, 38-42 and 44-46 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 6,426,110 to Almario Basa (“Basa”) as evidenced by “Alanate 385”, “14.0 Spray Drying”, and “Dairy Chemistry and Physics”. The Examiner alleges, in part, that because Basa teaches creamer powders comprising Alanate 385, which comprises 95.5% protein (dry weight), that the creamers anticipate the claimed foaming ingredients. Applicants cannot agree.

Applicants do not dispute that Basa teaches creamers comprising Alanate 385 and that *Alanate 385* comprises 95.5% protein. However, Basa does not teach *creamers* that comprise 95.5% protein. In other words, Alanate 385 is but one component of several components (e.g., carbohydrate, fat; *see* Abstract) required in a Basa creamer. And, the *protein* fraction of Basa’s creamers are taught to fall well below the 85% threshold required of the claimed invention. Basa is unequivocal in this respect: “The creamer powder ... *contains* from about 40 to about 60 % by weight of a water-soluble protein ... .” Col. 3, ln. 49-51 (emphasis added

to demonstrate that the teaching does not concern a preferred embodiment, but is an essential feature of the Basa creamers). Hence, even if Alanate 385 were 100% protein, the creamers of Basa would comprise no more than 60% Alanate 385. Indeed, the examples of Basa are consistent with Applicant's interpretation. For this reason alone, Basa cannot anticipate the claimed invention.

Applicants respectfully submit, in addition, that Basa's "creamers" are not equivalent to the "foaming ingredients" claimed. The fact that Basa's creamers may have application in a foaming beverage, as noted by the Examiner, does not render a "creamer" a "foaming ingredient".

The Examiner notes that Alanate 385 is a spray dried milk protein and concludes, therefore, that it "is a gas filled vacuole comprising air." Office Action, page 4. But nowhere does Basa teach that the *creamer* comprising Alanate 385 is spray dried. As discussed above, Alanate 385 is but one ingredient of the creamers, and not the *creamer per se*.

Applicants' claimed "foaming ingredients" can be distinguished from "creamers" on a structural level. For example, "creamers" do not comprise vacuoles having entrapped gas. As may be evidenced by EP 1074181 ("Bisperink," of record), there is significant interest in the art in the entrapment of gas to optimize foaming properties.

Withdrawal of the subject rejection is respectfully solicited.

### **35 U.S.C. § 103 rejections**

Claims 24, 26-48, and 51 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Basa as evidenced by Alanate 385, 14.0 Spray Drying, and Dairy Chemistry and Physics; and in view of U.S. Application Publication 2002/0127322 to Bisperink et al.<sup>1</sup>. Applicants respectfully disagree.

A single prior art reference or a combination of references must teach or suggest each and every claim feature of the claimed invention to render a claimed invention obvious. In

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<sup>1</sup> The '322 publication is a national stage filing of an international "PCT" application filed *before* Nov. 29, 2000. Hence, this reference can only be "prior art" under 102(a) or (b) as of its publication date (Sept. 12, 2002), which disqualifies the '322 publication *per se* as prior art. MPEP § 706.02(f)(1). The '322 publication,

the present case, as expounded above, one of the cited references, either alone or in combination, teaches a foaming ingredient, let alone one comprising vacuoles having walls comprising at least 85% by weight proteins.

In fact, as discussed in the last-filed Response dated December 4, 2009, Applicants respectfully maintain that nothing in the art could have reasonably motivated one of ordinary skill in the art to modify any of the compositions of the cited references (*e.g.*, to increase the protein concentration of a foaming ingredient) to reach the present invention. Consistent with this view, is the fact that even though Basa's teachings depart from "typical" creamers comprising 3-15% protein to creamers of "high protein content," even the "high protein content" of Basa falls well short of the 85% content required of the claimed invention. Col. 2, ln. 15-25.

Withdrawal of the subject rejection is accordingly solicited.

### **Conclusion**

Applicants believe that the present application is now in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested. The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

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however, claims foreign priority to EP 1074181 (published Feb. 7, 2001), which is already of record. Applicants have assumed, for the moment, that the Examiner intended to cite the EP document.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by a check or credit card payment form being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicants hereby petition for such extension under 37 C.F.R. § 1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

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Respectfully submitted,

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